FOR YOU COMMENTS
DON 5/23/95

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANDREW W. HUDY	)	
Claimant	)	
VS.	)	
	)	Docket No. 170,919
THE BOEING COMPANY - WICHITA	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent appeals from an Award entered in this case by Administrative Law Judge Shannon S. Krysl. The Appeals Board heard oral argument on July 21, 1994.

APPEARANCES

Claimant appeared by and through his attorney Andrew E. Busch, Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney Vaughn Burkholder, Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Marvin R. Appling, Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record and has adopted the stipulations listed in the Award.

ISSUES

The only finding challenged on appeal is the finding relating to nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds claimant should be awarded benefits based upon forty-seven and one-half percent (47.5%) work disability and the Award of the Administrative Law Judge is affirmed.

The question presented by the appeal concerns calculation of disability, specifically work disability, for the second of two compensable injuries. Respondent contends the Administrative Law Judge did not properly account for disability resulting from the first injury when she calculated the disability for the second injury. This appeal involves only the claim for the second injury.

The first injury occurred May 6, 1990, when claimant fell down a flight of stairs in the course of his work for respondent. The fall caused injury to his low back and Dr. Snyder performed a discectomy at L4-5 on October 10, 1991. Both Dr. Snyder and Dr. Schlachter found permanent impairment and recommended permanent work restrictions after the first accident. From these restrictions, Jerry Hardin and Karen Terrill testified claimant has, as a result of the first injury, a loss of ability to perform work in the open labor market. Jerry Hardin concluded the loss was sixty to seventy percent (60-70%) and Karen Terrill opined it was seven to twelve percent (7-12%).

Claimant returned to work for respondent in February 1992 at a wage comparable to the wage he was earning before the injury and surgery. The Administrative Law Judge relied on the presumption of no work disability established in K.S.A. 1992 Supp. 44-510e for persons who return to work at a comparable wage and found claimant had a twelve and one-half percent (12.5%) disability, based on functional impairment, from the first injury.

The second injury occurred February 1992 through October 22, 1992. In October 1992, claimant experienced acute onset of pain in his low back while working. Dr. Zimmerman of Boeing Central Medical again referred claimant to Dr. Snyder. Dr. Snyder found a recurrence of the herniated disc and performed a second surgery. When claimant attempted to return to work after the second surgery, he was informed no work was available for him. Claimant testified his condition was worse after the second surgery, than after the first. Dr. Zimmerman testified claimant's functional impairment was greater after the second surgery. Dr. Schlachter rated claimant's functional impairment slightly higher after the second surgery and recommended more limiting work restrictions.

Jerry Hardin and Karen Terrill also evaluated the impact of claimant's second injury on claimant's ability to perform work in the open labor market. Jerry Hardin testified that as a result of the second injury claimant has an additional five to ten percent (5-10%) reduction in his ability to perform work in the open labor market for a total loss after both injuries of seventy-five to eighty percent (75-80%). Karen Terrill testified claimant has an additional five percent (5%) reduction in access to the open labor market from the second injury for a total loss of twelve to eighteen percent (12-18%).

In determining the Award for the second injury, the Administrative Law Judge used the total resulting loss of access to the labor market: seventy-seven and one-half percent (77.5%) for Jerry Hardin and fifteen percent (15%) for Karen Terrill. The Administrative Law Judge then gave equal weight to the two experts to arrive at her conclusion claimant suffered a forty-six and one-quarter percent (46.25%) loss of ability to work in the open labor market.

Respondent argues that only the additional loss attributable directly to the second injury should be used. If the calculation were to be as respondent argues, only the five to ten percent (5-10%) additional loss from Jerry Hardin's opinion and the additional five percent (5%) from Karen Terrill's opinion should be considered. If both opinions were given equal weight, the result would be six and one-quarter percent (6.25%) loss of ability to work in the open labor market.

The Appeals Board agrees with the method followed by the Administrative Law Judge because the first injury resulted in benefits for functional impairment only. Claimant may have had work restrictions from the first injury, but he had no work disability. After the first injury, claimant returned to work at a wage comparable to his preinjury wage. An employee who returns to work at a comparable wage is presumed to have no work disability. K.S.A. 1992 Supp. 44-510e. This presumption recognizes that regardless of the restriction the injury may not, as a practical matter, impact the claimant's ability to earn a comparable wage or ability to obtain and retain employment. The affect on claimant's ability to obtain employment and earn wages may be potential only, not actual. To award work disability when there has not been and may never be an actual affect, would unduly benefit the claimant.

In this case, the evidence indicates and the Appeals Board finds the second injury resulted in some increase in functional impairment and somewhat more limiting work restrictions. The Appeals Board also finds the restrictions would prevent claimant from performing the work he had been performing at Boeing. Although the record does not provide clear evidence of the reason for termination of his employment, it is clear respondent advised claimant they no longer had a job for him. The record also establishes that the work claimant regularly performed for respondent violated not only the restrictions after the second accident, but, in fact, violated the restrictions imposed after the first. Since the second injury, however, claimant has entered the labor market with the work restrictions likely to interfere with his ability to perform work and earn a comparable wage. For these reasons, the Appeals Board finds that claimant should be entitled to an award of work disability based on the full extent of the disability. The benefits for the functional impairment awarded on the first claim are offset against the award on the second claim, pursuant to the credit provisions of K.S.A. 1992 Supp. 44-510a as the Administrative Law Judge has done in her award.

The Appeals Board also finds it reasonable to adopt the other findings and conclusions of the Administrative Law Judge. This includes the finding based on giving equal weight to the two expert opinions relating to loss of ability to earn a wage. By doing so, the Administrative Law Judge concluded claimant has a forty-eight and three-quarters percent (48.75%) loss of ability to earn a comparable wage. The Appeals Board agrees with and adopts this finding.

The Appeals Board also agrees with the decision to give equal weight to the wage and work ability prongs of the test for work disability. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). In this case, the result is a forty-seven and one-half percent (47.5%) disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated May 12, 1994, pertaining to

Docket No. 170,919, is affirmed in all respects and claimant is entitled to an Award against the respondent, The Boeing Company, and the insurance carrier, Aetna Casualty & Surety, for an accidental injury sustained on October 22, 1992.

For Docket No. 170,919 the claimant is entitled to 53.71 weeks temporary total disability at the rate of $299.00 per week or $16,059.29 followed by 232.72 weeks of permanent partial compensation at the reduced rate of $227.49 per week or $52,941.47 and permanent partial compensation at $283.21 per week or $30,999.24 not to exceed $100,000.00 for a 47.5% permanent partial general body disability, making a total award of $100,000.00 and with a contribution factor of 100% for the prior injury of May 6, 1990. As of May 12, 1994 there would be due and owing to the claimant 53.71 weeks temporary total compensation at $299.00 per week in the sum of $16,059.29 plus 27.29 weeks permanent partial compensation at the reduced rate of $227.49 per week in the sum of $6,208.20 for a total due and owing of $22,267.49 which is ordered paid in one lump sum less amounts previously paid. Followed by 205.43 weeks of permanent partial compensation at the reduced rate of $227.49 per week or $46,733.27 for a period from May 12, 1994 to April 19, 1998 when the first accident ends. Thereafter, the remaining balance in the amount of $30,999.24 shall be paid at $283.21 per week or until further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and workers compensation fund to be paid direct as follows:

Barbara J. Terrell & Associates	
Deposition of Ernest R. Schlachter, M.D.	Unknown
Deposition of Jerry D. Hardin	$137.50
Barber and Associates	
Transcript of Regular Hearing	$276.25
Deposition Services	
Deposition of Kenneth D. Zimmerman, M.D.	$413.20
Deposition of Karen Crist Terrill	$280.40

IT IS SO ORDERED.

Dated this ____ day of May, 1995.

BOARD MEMBER

DISSENT

We respectively dissent from the opinion of the majority. The award of work disability should be for the injury suffered which is the subject of this claim, not the cumulative effect of restrictions for this and prior injuries. Claimant's labor market is the labor market available to him at the time of his injury. Loss of labor market and loss of ability to earn a comparable wage should be measured using the claimant's physical status immediately prior to the subject injury. It should not assume claimant to be a healthy, whole person if he is not. The majority's award in this case presumes the claimant to be as he was in 1990, before his prior back injury. It does not take into consideration his pre-existing condition and the restrictions imposed from the past injury. Because of that, the calculations of labor market loss and loss of ability to earn a comparable wage are not accurate.

We also believe the credit provisions of K.S.A. 44-510a would not apply unless claimant's prior award was reviewed and modified to award a work disability. The reduction in labor market from the restrictions imposed for the first injury, being taken into consideration in ascertaining claimant's labor market for the second injury, eliminates the need for the K.S.A. 44-510a credit. For these reasons we dissent.

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BOARD MEMBER

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BOARD MEMBER

GM did Dissent portion only. 6/7/95

c: Andrew Busch, Wichita, Kansas
Vaughn Burkholder, Wichita, Kansas
Marvin Appling, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director